

Title	<b>Appellate Procedure: Federal Exhaustion Petition for Review</b> (adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44).
Summary	The proposed adoption of new rule 33.3 and amendment of rules 28.1(b) and 44(b) of the California Rules of Court would give defendants in criminal appeals, after a decision by the Court of Appeal, the option of filing an abbreviated petition for review in the Supreme Court for the purpose of exhausting state remedies before seeking federal habeas corpus review.
Source	Appellate Advisory Committee Justice Joyce L. Kennard, Chair
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Discussion	<p>In response to proposals by practitioners representing indigent defendants in criminal appeals, the Supreme Court has requested adoption of a procedure that would give such defendants, after a decision by the Court of Appeal, the option of filing an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before seeking federal habeas corpus review. These proposed new and amended rules would provide that procedure. The Appellate Advisory Committee invites public comment on the proposals.</p> <p>The exhaustion doctrine is codified in the federal statutes (28 U.S.C. § 2254(b)(1)) and well recognized in the case law (e.g., <i>O’Sullivan v. Boerckel</i> (1999) 526 U.S. 838). It dictates that “when a state prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” (<i>Id.</i> at p. 844.) The doctrine is an expression of the longstanding concern of the United States Supreme Court to preserve <i>comity</i> between the state and federal court systems. (<i>Id.</i> at p. 845.) The proposed rules seek to balance this concern with two others—the concern of the California Supreme Court to focus its limited resources on cases of statewide significance (see Cal. Rules of Court, rule 28(b)) and the concern of practitioners representing indigents to use their no less limited resources in the manner they deem best for their clients.</p>

Proposed new rule 33.3(b) seeks to achieve this balance by serving all three concerns identified above. It would preserve comity by requiring every defendant who intends to take a federal constitutional claim to the federal district court to first present that claim to the Supreme Court by serving and filing a petition for review. The petition would be required to comply with the time limit specified in rule 28(e) and with all but two of the requirements of form and content specified in rule 28.1. Although the petition would also be required to include a statement that “the case presents no grounds for review under rule 28(b),” the Advisory Committee Comment to the proposed rule explains that “The recital of that statement in the petition, however, does not mean the Supreme Court cannot order review if it determines the case warrants it. The list of grounds for granting review in rule 28(b) is not intended to be exclusive, and from time to time the Supreme Court has exercised its discretion to order review in a case that does not present one of the listed grounds.”

Second, proposed new rule 33.3(b) serves the concern of the Supreme Court to focus its limited resources on cases of statewide significance by requiring a petition filed for this purpose to be identified on the cover as a “Federal Exhaustion Petition for Review,” to acknowledge that it presents none of the listed grounds for review and is filed solely to exhaust state remedies, and to limit its recital of the facts and issues to a brief statement of each.

Third, proposed new rule 33.3(b) serves the concern of practitioners representing indigents to husband their limited resources by offering a simpler and less expensive alternative to preparing and filing a normal petition for review in the state high court. A normal petition must comply with each of the procedural requirements of rule 28.1(b), and an original and 13 copies must be filed in the Supreme Court (rule 44(b)(1)). Under this proposal, a petition filed solely to exhaust state remedies will be “abbreviated” in scope and content (proposed rule 33.3(b)(1)), will be prefaced by an acknowledgment that it presents none of the listed grounds for review, and will provide only a “brief” statement of the facts and issues (proposed rule 33.3(b)(3)). Finally, such a petition need not be served on the superior court clerk (proposed rule 33.3(b)(4)), and only an original and 8 copies need be filed (proposed amended rule 44(b)(1)(E)).

A further proposed amendment to rule 44(b)(1)(C) would provide that, in the interest of economy, only an original and 10 copies need be filed

of any petition for a writ within the original jurisdiction of the Supreme Court and any opposition or other response to such petition. That number of copies is sufficient for the needs of the Supreme Court.

A proposed amendment to rule 28.1(b) would alert practitioners to the fact that a petition for review filed solely to exhaust state remedies before seeking federal habeas corpus relief is governed by the special provisions of rule 33.3 rather than the provisions of rule 28.1, the general rule on petitions for review.

Attachments

Rule 33.3 of the California Rules of Court would be adopted and rules 28.1 and 44 would be amended, effective January 1, 2004, to read:

**Rule 33.3. Hearing and decision in the Supreme Court; federal exhaustion petition for review**

**(a) In general**

Rules 28 through 29.9 govern the hearing and decision in the Supreme Court of an appeal in a criminal case.

**(b) Federal exhaustion petition for review**

(1) After decision by the Court of Appeal in a criminal case, a defendant may file an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief.

(2) The words “Federal Exhaustion Petition for Review” must appear prominently on the cover of the petition.

(3) The petition need not comply with rule 28.1(b)(1)–(2) but must include:

(A) a statement that the case presents no grounds for review under rule 28(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;

(B) a brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and

(C) a brief statement of the factual and legal bases of the claim.

(4) The petition must be served on the Court of Appeal clerk but need not be served on the superior court clerk.

**Advisory Committee Comment (2004)**

Revised rule 33.3(a) is new, but it is not substantive change. It clarifies the applicability, to noncapital criminal appeals, of the rules governing the hearing and decision of civil appeals in the Supreme Court.

New rule 33.3(b), in a substantive change, gives the defendant in a criminal case, after a decision by the Court of Appeal, the option of filing an abbreviated petition for review for the sole purpose of exhausting state remedies before seeking federal habeas corpus review. Although

1 such a petition need not comply with rule 28.1(b)(1)–(2), it must comply with all the other  
2 requirements of rule 28.1 and with the additional requirements of rule 33.3(b). One of the latter  
3 requirements is a statement that “the case presents no grounds for review under rule 28(b)” (rule  
4 33.3(b)(3)(A)). The recital of that statement in the petition, however, does not mean the Supreme  
5 Court cannot order review if it determines the case warrants it. The list of grounds for granting  
6 review in rule 28(b) is not intended to be exclusive, and from time to time the Supreme Court has  
7 exercised its discretion to order review in a case that does not present one of the listed grounds.  
8 (Compare U.S. Supreme Court Rule 10 [the listed grounds for granting certiorari, “although  
9 neither controlling nor fully measuring the Court’s discretion, indicate the character of the  
10 reasons the Court considers”].)

11  
12 Rule 33.3(b)(3)(C) requires the petition to include a statement of the factual and legal  
13 bases of the claim. This showing is required by federal law: “for purposes of exhausting state  
14 remedies, a claim for relief [in state court] . . . must include reference to a specific federal  
15 consitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.”  
16 (Gray v. Netherland (1996) 518 U.S. 152, 162–163, citing Picard v. Connor (1971) 404 U.S.  
17 270.) Under the rule, however, the statement of facts and law must be “brief” (rule  
18 33.3(b)(3)(C)). And although the maximum allowable length of the petition is the same as that of  
19 a normal petition for review (see rule 28.1(e)), it is the intent of the rule that the petition should  
20 be as “abbreviated” as the case permits (rule 33.3(b)(1)).

21  
22 In the interest of economy, rule 33.3(b)(4) relieves the defendant from the duty to serve  
23 the superior court clerk (compare rule 28(f)(2)). It remains necessary for the defendant to serve  
24 the Court of Appeal clerk, however, in order to permit that clerk to determine when to issue the  
25 Court of Appeal remittitur (rule 26(b)(1)(A)).

26  
27 In the further interest of economy, amended rule 44(b)(1)(E) requires that an original and  
28 8 copies of the petition be filed in the Supreme Court, rather than the original and 13 copies  
29 required for a normal petition for review (rule 44(b)(1)(A)).  
30

1 **Rule 28.1. Form and contents of petition, answer, and reply**

2  
3 (a) \* \* \*

4  
5 (b) **Contents of a petition**

6  
7 (1) The body of the petition must begin with a concise, non argumentative  
8 statement of the issues presented for review, framing them in terms of  
9 the facts of the case but without unnecessary detail.

10  
11 (2) The petition must explain how the case presents a ground for review  
12 under rule 28(b).

13  
14 (3) If a petition for rehearing could have been filed in the Court of  
15 Appeal, the petition for review must state whether it was filed and, if  
16 so, how the court ruled.

17  
18 (4) If the petition seeks review of a Court of Appeal opinion, a copy of the  
19 opinion showing its filing date and a copy of any order modifying the  
20 opinion or directing its publication must be bound at the back of the  
21 original petition and each copy filed in the Supreme Court.

22  
23 (5) The title of the case and designation of the parties on the cover of the  
24 petition must be identical to the title and designation in the Court of  
25 Appeal opinion or order that is the subject of the petition.

26  
27 (6) Rule 33.3(b) governs the form and content of a petition for review  
28 filed by the defendant in a criminal case for the sole purpose of  
29 exhausting state remedies before seeking federal habeas corpus  
30 review.

31  
32 (c)–(f) \* \* \*

1 **Rule 44. Form and filing of papers**

2  
3 **(a) {Form}**

4  
5 Except as otherwise provided in these rules, all papers filed in a reviewing  
6 court may be either produced on a computer or typewritten or  
7 ~~proportionally spaced at the option of the party filing them. If typewritten,~~  
8 ~~they shall conform, as far as practicable, to the requirements of subdivision~~  
9 ~~(c) of rule 15. If proportionally spaced, they shall conform, as far as~~  
10 ~~practicable, to the requirements of subdivision (d) of rule 15 and must~~  
11 comply with the relevant provisions of rule 14(b). All copies of papers must  
12 be clear and legible. The use of recycled paper ~~shall be~~ is required for all  
13 papers filed with the court or served on the parties. The use of recycled  
14 paper for the cover of the brief is encouraged.

15  
16 **(b) {Number of copies}**

17  
18 If a brief, paper, or document, other than the record, is filed in a reviewing  
19 court the following number of copies ~~shall~~ must be filed:

20  
21 **(1) If filed in the Supreme Court:**

22  
23 ~~(i)(A)~~ (A) An original and 13 copies of a petition for review  
24 ~~or other petition, or an answer, opposition, or other~~  
25 ~~response to a petition or a reply.~~

26  
27 ~~(ii)(B)~~ (B) An original and ~~14~~ 13 copies of a brief in a cause  
28 pending in that court.

29  
30 (C) An original and 10 copies of a petition for a writ within the  
31 court's original jurisdiction or an opposition or other  
32 response to the petition.

33  
34 ~~(iii)(D)~~ (D) An original and 8 copies of a notice of motion, motion, or  
35 opposition or other response to a motion.

36  
37 (E) An original and 8 copies of a federal exhaustion petition for  
38 review, an answer, or a reply.

39  
40 ~~(iv)(F)~~ (F) An original and one copy of any other document or paper.

41  
42 **(2) If filed in a Court of Appeal:**

43  
44 ~~(i)(A)~~ (A) An original and 4 copies of a petition or an answer,

1 opposition, or other response to a petition.

2  
3 ~~(ii)~~(B) An original and 4 copies of a brief and, in civil appeals,  
4 proof of delivery of 5 copies to the Supreme Court.

5  
6 ~~(iii)~~(C) An original and 3 copies of a notice of motion, motion, or  
7 opposition or other response to a motion.

8  
9 ~~(iv)~~(D) An original and one copy of any other document or paper.

10  
11 **(c) {Covers}**

12  
13 So far as practicable, the covers of briefs and petitions should be in the  
14 following colors:

15 Appellant’s opening brief (rule 16 13(a))..... green  
16 Respondent’s brief (rule ~~16~~ 13(a))..... yellow  
17 Appellant’s reply brief (rule ~~16~~ 13(a))..... tan  
18 Amicus curiae brief..... gray  
19 Petition for rehearing..... orange  
20 Answers to petition for rehearing..... blue  
21 Petition for original writ or answer (opposition) to writ petition..... red  
22 Petition for review (rule ~~28(b)~~(a))..... white  
23 Answer to petition for review (rule ~~28(e)~~(a))..... blue  
24 Reply to answer (rule ~~28(d)~~(a))..... white  
25 Petitioner’s brief on the merits (rule ~~29.3~~ (29.1)(a))..... white  
26 Answer brief on the merits (rule ~~29.3~~ (29.1)(a))..... blue  
27 Reply brief on the merits (rule 29.1(a))..... white

28  
29  
30 A brief or petition not conforming to this subdivision ~~shall~~ must be  
31 accepted for filing; but in the case of repeated violations by an attorney or  
32 party, the court may proceed as provided in rule ~~18~~ 14(e).

33  
34 **(d) {Attorneys’ names, addresses, telephone numbers, State Bar numbers}**

35  
36 Every brief and other paper filed in a reviewing court ~~shall~~ must contain on  
37 the cover, or on the first page if there is no cover, the name, address, and  
38 telephone number of the attorney filing the paper, and the California State  
39 Bar membership number of that attorney and of every attorney who joins in  
40 the brief or paper. California State Bar membership numbers of the  
41 supervisors in a law firm or public law office of the attorney responsible for  
42 the case need not be stated.  
43



1     ~~Until July 1, 1994, a brief or other paper shall not be rejected for filing~~  
2     ~~because the attorney's California State Bar membership number is missing,~~  
3     ~~but it may be stricken if the attorney does not furnish the number promptly~~  
4     ~~upon request by the clerk.~~